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No. 84-817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL FOX AND MORRIS EXLER,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

BENJAMIN W. BOLEY
(Counsel of Record)
WILLIAM F. SHEEHAN
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

MICHAEL W. BURNS
JOSEPH S.D. CHRISTOF
DICKIE, MCCAMEY & CHILCOTE
3180 United States Steel Bldg.
600 Grant St.
Pittsburgh, PA 15129
(412) 281-7272
Counsel for Respondent

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Petitioners, represented by counsel, brought and then settled state court personal injury actions against respondent under § 1 of the Federal Employers' Liability Act. The settlements to which petitioners agreed provided for set-offs of benefits previously paid to them under an insurance program maintained by respondent. The question is:

Whether petitioners may challenge those settlements in federal court on the ground that they were contracts or devices that exempted respondent from FELA liability, in violation of § 5 of the Act.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 21a-29a) is not reported. The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 739 F.2d 939.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on July 20, 1984. A petition for rehearing was denied on August 23, 1984 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on November 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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* In compliance with Rule 28.1 of the Rules of this Court, respondent states that it has no corporate parent; that it owns 71% of the shares of Canada Southern Railway Company, the remaining of which are publicly held; and that it has no other publicly held corporate affiliates.

STATUTORY PROVISIONS INVOLVED

Sections 1 and 5 of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 and 55, are reproduced at Pet. 2-3.

STATEMENT

1. *Background of the complaint.* Petitioners, while employed by respondent (hereinafter sometimes referred to as "Conrail"), suffered on-the-job injuries for which they filed suit under § 1 of the Federal Employers' Liability Act ("FELA") in the Court of Common Pleas of Allegheny County, Pennsylvania. (Pet. App. 36a-37a.) That Act gives railroad employees a statutory remedy for on-the-job injuries caused by the negligence of their employers or fellow workers. On or about October 23, 1980, petitioner Fox agreed to a settlement of his suit, and on or about March 24, 1981, petitioner Exler agreed to a settlement of his suit. (Pet. 4-5.) Both petitioners dismissed their state court cases. (Pet. 10.)

The settlements, written on the letterhead of petitioners' lawyers (Pet. App. 40a-41a, 42a-43a), provide for a "Net Settlement" arrived at by deducting, from an amount called "Settlement," (a) payments previously received by petitioners from the Railroad Retirement Board, and (b) payments previously received by petitioners under a supplemental sickness benefit plan ("the Supplemental Plan") that Conrail, along with many other railroads, maintains for the benefit of certain railroad employees. The "Balance" actually paid to petitioners reflected further deductions for attorneys' fees and expenses. (*Id.*)

Several years later, petitioners filed a complaint in the federal district court for the Western District of Pennsylvania. (Pet. App. 32a-43a.) They sued on their own behalf and on behalf of a purported class consisting of all past and present Conrail employees who within the previous six years had brought FELA actions that

had been resolved by settlements that reflected deductions for benefits received under the Supplemental Plan. (Complaint ¶ 5; Pet. App. 34a.)[1] They alleged that those settlements should be reopened on the ground that they violated § 5 of the FELA. (Complaint ¶¶ 17, 20; Pet. App. 37a-38a; see also Pet. App. 5a, 22a.) Section 5 provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Petitioners sought damages in the amount of the Supplemental Plan benefits that were taken into account in settling their FELA cases and declaratory and injunctive relief barring such benefits from being taken into similar account in the future. (Pet. App. 38a-39a.)

2. *The decisions below.* Respondent moved to dismiss the complaint on the grounds (a) that § 5 creates no private right of action and (b) that, in any event, the settlements did not violate § 5 in light of this Court's ruling in *Callen* v. *Pennsylvania Railroad*, 332 U.S. 625,

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[1] Petitioners sought to sue a class of defendants consisting of all railroads that participate in the Supplemental Plan (Complaint ¶ 6; Pet. App. 34a), although the proposed plaintiff class consisted only of Conrail employees and the complaint was silent as to what claims the members of that class might have against other railroads. The complaint also purported to sue on behalf of all Conrail employees whose FELA suits ended in "awards" (Complaint ¶ 5; Pet. App. 34a), presumably meaning judgments, although neither of petitioners' suits ended in judgments.

631 (1948), that a settlement "is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." The district court granted respondent's motion on the first ground argued—that there is no private right of action under § 5—and did not discuss *Callen*.[2]

In the court of appeals petitioners conceded that § 5 does not create a private right of action.[3] They argued, however, that their complaint had been misconstrued. The complaint, they said, alleged a claim under § 1 of the Act for "restoration of damages that they were lawfully entitled to" under their original personal injury claims brought and settled in state court. (Pet. App. 7a.) Respondent argued that petitioners' characterization of their complaint did not square with its allegations. Respondent also argued that even if the complaint did allege claims under § 1, it was properly dismissed because § 1 creates a cause of action only for personal injuries based on the carrier's negligence, and does not encompass suits that attack prior settlements and rest ultimately on allegations of purposeful violations of § 5. Respondent further argued that the settlements were law-

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[2] At petitioners' request the district court ruled on respondent's motion to dismiss before considering petitioners' motion for class action certification, and accordingly no class was ever certified. (Pet. 4 n.1; Pet. App. 24a-25a n.5.)

[3] The district court had relied for its ruling on *Fullerton* v. *Monongahela Connecting Railroad Co.*, 242 F. Supp. 662 (W.D. Pa. 1965), and *Bay* v. *Western Pac. R.R.*, 595 F.2d 514 (9th Cir. 1975). In the court of appeals petitioners said:

> "As a result, there can be little question that the claimants in *Fullerton* and *Bay* were attempting to use the protective shielding nature of § 55 as a sword in contravention of the rulings of *Boyd* [v. *Grand Trunk Western R.R.*, 338 U.S. 263 (1949)] and *Philadelphia, Baltimore & Washington Railroad* [v. *Schubert*, 224 U.S. 603 (1912)]. The congressional intent as stated by the Supreme Court in *Boyd* was not to create a sword, or private cause of action under § 55."

Brief and Appendix of Appellants, page 13.

ful in any event under *Callen* v. *Pennsylvania Railroad, supra.*

The court of appeals apparently accepted petitioners' concession that there is no private right of action under § 5, for it noted but did not pass on the district court's holding to that effect. The court then said that if it "were to view the present suit as representing a new claim" under § 1, it would have "serious doubts" whether the suit would lie since "the injury complained of is economic, not tortious"; the railroad's alleged misbehavior in connection with the settlement "was deliberate, not negligent"; and "the basis for claiming that the railroad's actions were illegal is the violation of a federal statutory provision and is not grounded in the common law" of negligence that underlies the statutory cause of action granted by § 1. (Pet. App. 6a-7a.)

The court went on, however, to say that petitioners sought to characterize their suit "as one arising from the alleged tort that formed the basis of their original state court suits." (*Id.*) "Viewed as such," said the court, "what [petitioners] are seeking is federal review of a settlement agreement that terminated previously instituted [state court] FELA suits." (*Id.*) The court then ruled that petitioners were not entitled to such review because federal courts should not entertain nonconstitutional collateral attacks on settlements of state court suits. The court directed petitioners to return to state court "for any relief to which they may be entitled" and affirmed the judgment of the district court dismissing the complaint. (*Id.* 9a.)[4]

Circuit Judge Weis dissented. In his view petitioners had stated a mixed § 1 and § 5 claim that was distinguishable from the claims made in those cases holding

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[4] Neither party's brief on appeal addressed the question whether petitioners should return to state court. The court of appeals did not hear oral argument. Nor was the issue raised in the district court.

that § 5 creates no private cause of action. (*Id.* 12a-13a.) Judge Weis also stated that the majority erred in declining to adjudicate that claim. (*Id.* 13a-16a.) He did not address respondent's argument that the settlements were valid under *Callen*.

REASONS FOR DENYING THE WRIT

The confusion on the record below about the nature of the cause of action petitioners seek to pursue is reason enough to deny the writ. But there are equally if not more compelling reasons going to the merits of petitioners' claims, no matter how construed. Petitioners' complaint shows on its face that their suit is groundless. The settlement papers attached to and made part of the complaint make clear that petitioners settled their state court FELA claims while represented by counsel who set out in detail the precise terms of the settlements and the exact amounts of money petitioners would receive. (Pet. App. 41a-43a.) Petitioners' repeated contention that respondent later surprised them by paying less than the agreed upon amount is flatly refuted by the settlement sheets themselves as well as by the dismissal of petitioners' suits in state court.[5]

Beyond that, as we show below, (a) this is really a case brought under § 5 of the FELA and was therefore rightly dismissed because, as has been consistently held and as petitioners agree, there is no private right of action under § 5; (b) even if petitioners' complaint can be read, notwithstanding its plain meaning, to seek to

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[5] The "Net Settlement" figures reflect a deduction from the "Settlement" figure not only for previously paid Supplemental Plan benefits but also for previously paid Railroad Retirement Board benefits. Petitioners have never attacked the set-off for Retirement Board payments, further confirming what the settlement sheets show, namely that petitioners were aware that the "Net Settlement" figure rather than the "Settlement" figure reflected the actual settlement amount.

assert a claim under § 1 of the FELA, it was properly dismissed because § 1 creates a cause of action only for personal injury caused by the negligence of the carrier; (c) in any event, the settlements challenged by petitioners were valid under *Callen, supra*; and (d) the court of appeals' rationale reflected a proper and wise exercise of its discretion and furthered the congressional judgment that FELA suits brought in state courts should stay there.

1. The Complaint Was Rightly Dismissed Because § 5 Does Not Create a Private Right of Action.

The FELA was passed in 1908 out of a solicitude for the welfare of railroad employees, and it accordingly modified or abrogated altogether certain common law defenses to personal injury actions, such as the fellow-servant rule and the contributory negligence rule. *Second Employers' Liability Cases*, 223 U.S. 1, 49-50 (1912). Section 5 was included in the statute "to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." *Id.* 52. Among the "devices" known to Congress at the time of enactment was the practice of some railroads of maintaining "relief" funds that were available to employees who agreed that the acceptance of benefits therefrom would waive any future claim for liability in damages. In some instances participation in such "relief" funds was a condition of employment. See *Duncan* v. *Thompson*, 315 U.S. 1, 5 (1942). Section 5 declared such agreements void and barred railroads from using them as a defense to an action brought under the statute. *Philadelphia, Balt. & Wash. R.R.* v. *Schubert*, 224 U.S. 603, 612 (1912).

Section 5 thus protects employees against a railroad's efforts to defeat an FELA action with a claim of waiver based on an invalid agreement or other evasive device entered into before any alleged injury. It does not, however, grant the employee a private right of action to enforce Section 5. That is what the district court held,

and that is what every other court to have faced the issue has held. *Fullerton, supra,* and *Bay, supra,* note 3.[6]

Petitioners conceded this issue in the court of appeals (see note 3, *supra*) and have not brought it here. They recognize that if theirs is an independent action to redress an alleged violation of § 5 it was rightly dismissed. But that is precisely the gravamen of the complaint. It alleges a violation of § 5 in five places. (Complaint ¶¶ 8a, 8c, 14, 17, and 20; Pet. App. 35a, 37a-38a.) For relief it requests a declaration that § 5 has been violated, an award of damages, and an injunction against further violations. (Pet. App. 38a-39a.) Section 1 is mentioned only in passing: once to describe the purported class as consisting of employees who previously brought FELA actions, and once to allege that whether Supplemental Plan deductions were reflected in the settlements of other suits brought under § 1 is a common question of fact. (Complaint ¶¶ 5, 8; Pet. App. 34a-35a.)

In short, petitioners once had § 1 claims but they settled them. The claim they now seek to assert is one charging a violation of § 5. For that reason it was correctly dismissed.

2. Only Personal Injury Actions For Negligence Can Be Brought Under § 1.

Even accepting petitioners' characterization of their suit as having been brought under § 1, it was rightly

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[6] *Bay* was followed in *Landfried* v. *Terminal R.R. Assoc. of St. Louis,* 721 F.2d 254 (8th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3720 (U.S., Apr. 3, 1984), and *Jackson* v. *Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3551 (U.S., Jan. 24, 1984). Both cases involved claims that the carriers had discharged the plaintiffs in retaliation for the plaintiffs' having brought FELA suits against them. Both courts held that the plaintiffs had not alleged a violation of any federal statute entitling them to avoid the dispute-resolving procedures of the Railway Labor Act, citing *Bay* for the proposition that § 5 creates no private right of action.

dismissed. Section 1 creates a cause of action only for personal injuries, and attempts to recover damages under the FELA for other than personal injuries have accordingly been uniformly unsuccessful.[7] See *Sharkey* v. *Penn Central Transp. Co.*, 493 F.2d 685, 688 (2d Cir. 1974) (suit for wrongful discharge will not lie under § 1); *Brady* v. *Penn Central Transp. Co.*, 406 F. Supp. 1239, 1241 (S.D.N.Y. 1975) (action for false arrest and malicious prosecution, not involving personal injury, will not lie under § 1). See also *Forgione* v. *United States*, 202 F.2d 249, 252 n.5 (3d Cir. 1953).

Petitioners had claims under § 1 for personal injuries but settled them. Petitioners now complain about their settlements, not their personal injuries. They say that the settlements were tainted by violations of § 5. But neither the alleged violations of § 5 nor the settlements themselves did bodily harm to anyone. Hence they do not give rise to any claim that can be brought under § 1.

Moreover, petitioners complain of intentional rather than negligent conduct by the carrier, *i.e.*, the carrier's agreement to a settlement reflecting adjustments for Supplemental Plan benefits petitioners had already re-

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[7] Section 1 renders railroads liable to employees "suffering injury * * * for such injury or death resulting" from negligence. Section 3 of the Act shows that the "injury" under § 1 must be personal, bodily injury: it provides that contributory negligence by the employee does not bar the recovery of damages "for personal injuries to the employee, or where such injuries have resulted in his death." It would make no sense to read the statute to mean that the "injuries" referred to in § 3—the recovery for which is not barred by contributory negligence—are different from the "injury" that gives rise to the cause of action under § 1. Moreover, the legislative history of the statute supports the plain meaning of its language. See H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908) (purpose of FELA is "to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service").

ceived. That is not a claim cognizable under § 1. Section 1 creates a cause of action only for personal injuries "resulting in whole or in part from the negligence" of the carrier's officers or employees, "or by reason of any defect or insufficiency, due to its negligence," in railroad equipment. (Pet. 2.) With one exception not applicable here,[8] intentional conduct does not constitute "negligence" under § 1 of the Act.[9] Accordingly, even if petitioners were suing for personal injuries—which they are not—they could not sue under § 1 for recompense for the purposeful conduct of Conrail they claim was unlawful.

3. *Callen* v. *Pennsylvania Railroad* is Dispositive.

Judge Weis in dissent below suggested that petitioners could properly sue because their claim was simply a continuation of their original § 1 suit for personal injuries in state court. He reasoned that petitioners could have filed their § 1 personal injury actions anew in federal court and then litigated the validity of the prior settlements under § 5 when respondent raised them as a defense.

This is not, of course, what petitioners did in this case, but even if they had it would have been unavailing.

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[8] The courts have included intentional conduct within the concept of negligence for FELA purposes only in the isolated instance of an assault committed in the furtherance of the employer's business. See *Jamison* v. *Encarnacion*, 281 U.S. 635 (1930); *Lambert* v. *Morania Oil Tanker Corp.*, 677 F.2d 245 (2d Cir. 1982); *Sowards* v. *Chesapeake & Ohio R.R.*, 580 F.2d 713 (4th Cir. 1978).

[9] See *Beanland* v. *Chicago, Rock Island, & Pac. R.R.*, 480 F.2d 109, 113 (8th Cir. 1973) ("Damages resulting from *intentional* acts, such as the discharge [of the plaintiff], have no place in a personal injury F.E.L.A. action which deals exclusively with *negligence*.") (emphasis in original); *Forgione* v. *United States*, 202 F.2d 249, 252 (3d Cir. 1953); *Fullerton* v. *Monongahela Connecting R.R.*, 242 F. Supp. 622, 626 (W.D. Pa. 1965).

That is because this Court in *Callen* v. *Pennsylvania Railroad, supra*, held that the settlement of petitioners' FELA claims was not, as a matter of law, a prohibited "contract" or "device" to avoid liability within the meaning of § 5.[10]

In *Callen* a railroad employee, subsequent to his alleged injury, entered into a general release with the carrier whereby in exchange for $250 he released all claims against the carrier for that particular injury. The employee then brought an FELA action against the carrier. The district court withdrew from the jury the question whether the release barred the suit, an action the court of appeals and this Court held was error. The plaintiff's argument that the release violated § 5 was squarely rejected:

> "It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." 332 U.S. at 631.

A contrary result would have been startling. It would have meant that in enacting § 5 Congress mandated that every FELA complaint be litigated to judgment regardless of the parties' desire to settle.

Once it is established that a settlement is not a "contract * * * or device to exempt" a railroad "from liability," and therefore does not violate § 5, it follows that § 5 leaves the terms of such settlements to the parties. Those terms can be generous or stingy, routine or pecu-

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[10] Neither court below, each finding a different reason to dismiss the complaint, addressed our argument that *Callen* is dispositive. Petitioners did not address *Callen* either in the district court or in the court of appeals, and they do not mention it in their petition. Nor did Judge Weis mention *Callen* in his dissent.

liar; § 5 is indifferent. Nothing prevents the parties from agreeing to make deductions from or additions to amounts that they consider to be starting points. The only thing that § 5 would prohibit the parties from doing is agreeing as a condition of settlement to exempt the railroad from FELA liability in *future* cases. The settlements at bar contain no such provision. The complaint makes no such claim. As this Court has recognized, albeit in another context:

> "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950).

Judge Weis thought that petitioners were entitled to litigate the validity of their settlements just as a previous settlement was the subject of litigation in *Duncan* v. *Thompson*, 315 U.S. 1 (1942). Petitioners make the same argument. (Pet. 11-12.) But that case is inapposite. After Duncan was injured, the carrier paid him $600 pursuant to an agreement requiring him to repay it before bringing suit. When Duncan sued without repayment the carrier asked for dismissal. Duncan answered that the agreement contravened § 5. This Court took the case to decide whether—and did decide that—§ 5 reaches agreements made subsequent to the alleged injury. *Id.* 4-5. It then held that the agreement at issue violated § 5 because it created a "condition precedent" to suit that "in view of Duncan's straitened circumstances" could probably not be met. *Id.* 7. But the Court was not faced with the lawfulness of a settlement reached after injury, and it was careful to say so (*id.*):

> "We need not here determine what limitations, if any, § 5 places on the validity of agreements not to sue if made in consideration of a bona fide compromise and settlement of claims arising under the act, because the very language of the (Duncan) agreement indicates it is not a compromise and settlement."

When, in *Callen*, the Court did consider the lawfulness of post-injury settlements under § 5, it upheld them.

The upshot is that, even if petitioners had brought a § 1 personal injury suit in federal court based on the same injuries for which they earlier sued in state court, that suit would have been dismissed on the ground that they had earlier compromised their claims in a voluntary settlement that was wholly lawful under *Callen*.[11] *Duncan*, which did not address the lawfulness of settlements, is thus no help to petitioners.[12]

The same is true of those decisions considering what sorts of deductions from a judgment are allowed by the proviso to § 5. The proviso permits the "set off" of "any sum [the carrier] has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee * * * on account of the injury or death for which said [§ 1] action was brought." (Pet. 3.) Several decisions, cited by petitioners (Pet. 14-15), hold that benefits paid pursuant to programs that have been bargained for, and are part of the employee's compensation, may not be set off under § 5 since they are not paid "on account of the injury." But see *Thomas* v. *Humble Oil & Ref. Co.*, 420 F.2d 793, 795 (4th Cir. 1970). In those cases the meaning of the proviso—not the question of what is an unlawful "device"—is litigated in an on-going case to determine what set off would

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[11] Petitioners' sole claim is that their settlements are prohibited "devices" under § 5. They have never alleged any other ground for setting those settlements aside, such as coercion by respondent, and no such claim could be made given petitioners' voluntary agreement to those settlements while represented by counsel and their voluntary dismissal of their state court suits.

[12] Moreover, with respect to petitioner Exler, who suffered injury on April 26, 1976 (Pet. 5), the complaint in this case, even if it could be said to be a suit to recover for that injury, would be barred by the FELA 6-year statute of limitations, since the complaint was filed on February 17, 1983.

be appropriate from a judgment. The *proviso* and those cases are irrelevant here, where petitioners settled their suits.

4. The Rationale of the Court of Appeals Was Sound.

Petitioners argue that the court of appeals erroneously applied the abstention doctrine in remitting them to state court. (Pet. 8-10.) In our view, however, the court correctly disposed of petitioners' claims, not on the basis of the abstention doctrine, but on the basis of traditional principles of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Arizona* v. *San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Application of these principles, which this Court has often distinguished from those underlying the abstention doctrine,[13] is largely committed to the discretion of the lower courts. *Moses H. Cone Hospital, supra*, 460 U.S. at 19; *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 663 (1978). In this case the exercise of that discretion was soundly based on considerations of "comprehensive disposition of litigation" and furthered the congressional judgments implicit in the jurisdictional provisions and restrictions applicable to FELA cases.

Petitioners' federal court action raised questions regarding the validity and interpretation of state court settlement agreements. As many courts have held, a controversy involving a "compromise or settlement of litigation is always referable to the action or proceeding in the court where the compromise was effected; it is through that court the carrying out of the agreement should thereafter be controlled. Otherwise the compromise, instead of being an aid to litigation, would be only

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[13] *Moses H. Cone Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983); *Colorado River Water Conserv. Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Corp.*, 342 U.S. 180, 183 (1952).

productive of litigation as a separate and additional impetus." *Melnick* v. *Binenstock*, 318 Pa. 533, 536, 179 A. 77, 78 (1935). *Accord*, *Lee* v. *Hunt*, 483 F. Supp. 826, 832 (W.D. La. 1979), *aff'd*, 631 F.2d 1171 (5th Cir. 1980). Thus, the principles of judicial administration encouraging the comprehensive settlement of litigation mandate that challenges to a settlement agreement be brought in the same court where the settlement agreement was entered. See *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1373 (6th Cir. 1976).[14] Here the court of appeals correctly applied these sound principles.

The decision below also furthers the congressional judgments underlying the jurisdictional provisions governing FELA cases. The FELA provides for concurrent state court and federal court jurisdiction over FELA claims, 45 U.S.C. § 56, and the state courts are obliged to entertain such claims. *McKnett* v. *St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934); *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912). More importantly, pursuant to 28 U.S.C. § 1445(a), an FELA case brought in a state court "may not be removed to any district court of the United States." Section 1445(a) reflects Congress' determination that once an FELA

[14] These principles prevail in related contexts as well. Thus, where a settlement has been incorporated in a judgment, a party seeking to vacate such a judgment must proceed in the court that rendered the judgment. Advisory Comm. Notes to Fed. R. Civ. P. 60(b). Moreover, even where a party does not seek to vacate a judgment, but merely "to deny the guilty party the fruits thereof," 7 J. Moore's Federal Practice, ¶ 60.36, at 60-368, such an independent action must as a matter of judicial comity and efficiency be brought in the court that rendered the judgment. *E.g.*, *Lapin* v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). Indeed, even a non-party to a prior consent decree is ordinarily not permitted to file an independent suit collaterally attacking the decree. *E.g.*, *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3287 (U.S., Oct. 11, 1983); *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Culbreath* v. *Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980).

case reaches state court "it should remain there through disposition." *Fernandez* v. *Reynolds Metals Co.*, 384 F. Supp. 1281, 1283 (S.D. Tex. 1974); *accord, Kay* v. *Home Indemnity Co.*, 337 F.2d 898, 902 (5th Cir. 1965). This determination is inconsistent with petitioners' argument that their federal court suit should be allowable as an effort to "complete" their § 1 recovery secured in the state court suit. (Pet. 11, 14.)[15]

In any event, whether or not a ruling that federal courts should not entertain collateral attacks on state court settlements might ever be worthy of this Court's attention, that issue should not be reviewed in this case, where the issue was not addressed by the parties below and where dismissal of the complaint was proper for several other reasons, not the least of which is that the settlements pleaded by the complaint defeat it on its face.

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[15] In *Colorado River Water Conserv. Dist., supra,* and *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* this Court held that the McCarran Amendment, which waives the sovereign immunity of the United States as to water rights adjudications in state courts, was an important countervailing factor weighing against the ordinary obligation of federal courts to exercise their jurisdiction. The FELA's provision of concurrent state-federal jurisdiction and in particular its prohibition on removal constitute an equally strong countervailing factor. See Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River,* 44 U. Chi. L. Rev. 641, 666-68 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN W. BOLEY
(Counsel of Record)
WILLIAM F. SHEEHAN
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

MICHAEL W. BURNS
JOSEPH S.D. CHRISTOF
DICKIE, MCCAMEY & CHILCOTE
3180 United States Steel Bldg.
600 Grant St.
Pittsburgh, PA 15129
(412) 281-7272

Counsel for Respondent

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